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WHO IS RESPONSIBLE FOR PRESIDENTIAL SUPREMACY?

Kathleen Tipler*

LOUIS FISHER, *SUPREME COURT EXPANSION OF PRESIDENTIAL POWER: UNCONSTITUTIONAL LEANINGS* (UNIVERSITY PRESS OF KANSAS 2017). Pp. 352. HARDCOVER \$39.95.

LOUIS FISHER, *PRESIDENT OBAMA: CONSTITUTIONAL ASPIRATIONS AND EXECUTIVE ACTIONS* (UNIVERSITY PRESS OF KANSAS 2018). Pp. 296. HARDCOVER \$45.00. PAPERBACK \$24.95.

HEIDI KITROSSER, *RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION* (UNIVERSITY OF CHICAGO PRESS 2015). Pp. 272. HARDCOVER \$45.00. PAPERBACK \$36.00.

This moment is an interesting one in the history of presidential power. The current President has displayed an unusually dismissive attitude towards legislative constraints. He has openly asked for foreign assistance in elections.¹ When Congress was unwilling to provide him funds for his desired wall on the US-Mexico border, he declared an emergency in order to redirect funds from the Department of Defense and the Treasury.² He suggested a whistleblower, who followed statutory procedure, was akin to a “spy” who must be discovered, and then reminded his audience what used to be done to spies and those who engaged in “treason.”³ He is famous for saying that he could shoot someone on Fifth Avenue and not lose any voters.⁴ While the open disregard for, and undermining of,

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1. Aaron Blake, *Trump Just Mused Openly About Committing What Might Well Be a Crime*, WASH. POST (June 13, 2019), <https://www.washingtonpost.com/politics/2019/06/13/why-trumps-comment-about-accepting-foreign-help-is-so-astounding/>.

2. Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html>.

3. Eli Stokols, *Listen: Audio of Trump Discussing Whistleblower at Private Event: ‘That’s Close to a Spy’*, L.A. TIMES (Sept. 26, 2019), <https://www.latimes.com/politics/story/2019-09-26/trump-at-private-breakfast-who-gave-the-whistle-blower-the-information-because-thats-almost-a-spy>.

4. Ali Vitali, *Trump Says He Could ‘Shoot Somebody’ and Still Maintain Support*, NBC NEWS (Jan. 23, 2016), <https://www.nbcnews.com/politics/2016-election/trump-says-he-could-shoot-somebody-still-maintain-support-n502911>.

laws, norms, and institutional practices is distinct, the Trump administration should not be considered an anomaly or outlier in constitutional politics. Constitutional scholars cannot explain away the Trump administration as the product of forces exogenous to, or outside of, constitutional politics, as the Trump administration is built upon the prior legitimization of presidential supremacy.

The expansion of executive power over the twentieth and twenty-first centuries is an oft discussed topic in constitutional studies. Frequently, Congress is blamed for expanded executive power: it seems a president will “be as big a man as he can” (or as big a woman as she can), so it is up to Congress to check any unconstitutional expansion of executive power.⁵ The division of powers between the branches encourages Congress to jealously protect its own powers from executive encroachment, as Madison explained in Federalist 51; and, these critics of Congress argue, the legislature, unlike the judiciary, is an explicitly political branch and has enormous powers at its disposal.

While not letting Congress off the hook, Louis Fisher, in *Supreme Court Expansion of Presidential Power: Unconstitutional Leanings* and *President Obama: Constitutional Aspirations and Executive Actions*, and Heidi Kitrosser, in *Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution*, emphasize the role of other actors in legitimating the expansion of executive power. As its title indicates, *Supreme Court Expansion of Presidential Power* highlights the Supreme Court’s role; while the Supreme Court is his main target, Fisher also uses this book to draw attention to the role played by popular and scholarly accounts of presidential power. In *President Obama*, Fisher continues his criticism of the judiciary and academics, but his main focus is presidential responsibility. Fisher argues that Obama turned too frequently to executive actions to accomplish his goals, despite Obama’s earlier criticisms of the George W. Bush (Bush II) administration. Heidi Kitrosser, in *Reclaiming Accountability*, likewise places blame on scholarly accounts of executive power, which are too easily accepted by the media and the public.

Read together, these three books offer compelling support that responsibility for expanded presidential powers lies with many actors because many actors are complicit in legitimizing that expansion. In taking aim at these theories of legitimation, Fisher and Kitrosser say not only who is responsible for expanded executive power, but what is responsible: namely, the privileging of a formalistic approach to the separation of powers over a substantive approach, such that mechanisms for sharing power and responsibilities between the branches—mechanisms like the legislative veto or judicial review of state secrets—are seen as unconstitutional violations of executive power.

In *Supreme Court Expansion of Presidential Power*, Fisher’s explicit goal is to reveal the extent to which the Supreme Court has contributed to the unconstitutional expansion of executive power.⁶ He argues that for much of US history, the Supreme Court was equally deferential to Congress and the President. But after 1936, Fisher claims, the Supreme Court deferred more to the executive and less to Congress, upsetting the balance

5. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 70 (1908).

6. LOUIS FISHER, SUPREME COURT EXPANSION OF PRESIDENTIAL POWER: UNCONSTITUTIONAL LEANINGS xi (2017).

of power between the branches.⁷ Fisher's aim with this book appears to be largely descriptive rather than causal. He contrasts his history of presidential power and Supreme Court acquiescence with the histories of those who advocate a unitary theory of the executive or exclusive executive powers in foreign affairs; proponents of these theories of expansive executive power frequently trace that power to the Founding and early republic, and Fisher's account intentionally undermines their arguments.

Fisher argues that national welfare is best achieved, and constitutional principles are best protected, when courts do not assert an overly formalistic view of separation of powers—what Fisher calls “total separation”—and do not uphold many powers and obligations as exclusively within the realm of the executive.⁸ *Supreme Court Expansion of Presidential Power* is largely organized chronologically, and Fisher persuasively demonstrates that the Court (and Congress) have not always had such a deferential attitude toward executive power. He brings up many examples when the public, the judiciary, and Congress have pushed back against broad assertions of executive power, as when jurors would not convict fellow citizens under George Washington's Neutrality Proclamation, rejecting a president's power to unilaterally make criminal law⁹; or when Alexander Hamilton and Chief Justice John Marshall both rejected as unconstitutional President Adams' deviation from Congress' specific blockade instructions during the Quasi-War¹⁰; or when Congress subpoenaed the brother of President Harding's Attorney General during the Teapot Dome Scandal, and the Supreme Court upheld congressional power to do so.¹¹

What happened in 1936 that initiated judicial deference toward, and thus legitimation of, expansive executive power? In 1936, the Supreme Court issued its opinion in *United States v. Curtiss-Wright Export Corp.*¹² For Fisher, *Curtiss-Wright* is both a turning point and an exemplary case, one which he returns to repeatedly in *Supreme Court Expansion of Presidential Power* as well as in his other book discussed in this review, *President Obama*. In *Curtiss-Wright*, Justice Sutherland, who wrote the opinion, “chose to go beyond the necessities of the case to announce a broad grant of power to the President in external affairs” and supported this broad grant of power with a blatantly incorrect interpretation of a speech by John Marshall in 1800.¹³ In this speech, Marshall described President John Adams as “the sole organ of the nation in its external relations.”¹⁴ Properly contextualized, it is clear that Marshall meant that presidents are the sole organ for implementation of the law; but Sutherland misdescribed it in *Curtiss-Wright* as meaning that Marshall—then a member of the House of Representatives, later Chief Justice of the Supreme Court—understood that presidents had “plenary and exclusive authority over foreign affairs.”¹⁵ As Fisher shows, the sole-organ doctrine had staying power, being repeated by legislators and courts alike, despite a continuous stream of academic articles

7. *Id.*

8. *Id.* at 63.

9. *Id.* at 25.

10. *Id.* at 27–28.

11. FISHER, *supra* note 6, at 60.

12. 299 U.S. 304 (1936).

13. FISHER, *supra* note 6, at 67.

14. 10 ANNALS OF CONG. 613 (1800).

15. FISHER, *supra* note 6, at 67.

pointing both to Sutherland's incorrect interpretation of Marshall, and to the fact that Sutherland's interpretation was dicta and not a central holding. For Fisher, *Curtiss-Wright* exemplifies how sloppy dicta "can eventually be accepted as the holding" and so change the boundary between the legitimate and illegitimate exercise of power to the detriment of the Constitution and national welfare.¹⁶

Recent books, such as Stephen Griffin's *Long Wars and the Constitution*¹⁷ and Mariah Zeisberg's *War Powers: The Politics of Constitutional Authority*,¹⁸ have a timeline for the expansion of executive power that is largely consistent with Fisher's, although both Griffin and Zeisberg locate the origins of that expansion in the specific security needs of the Cold War.¹⁹ While Fisher places the expansion of executive power in its foreign affairs context, Fisher does not claim that the security context is the central cause of expansion; his project is distinct in his focus on the changing approach of the Supreme Court toward expansive claims and the ways in which academic scholarship can support and legitimize "misconceptions about presidential power."²⁰ Fisher does not lay out a clear causal story and instead takes aim at three targets: "[c]areless, [e]rroneous [d]icta" written by the Supreme Court, which he contrasts with more disciplined lower court opinion writing; the romanticizing of presidents and presidential power by the judiciary, academics, and the larger public; and an unwillingness by both the public and the Court to recognize clear judicial mistakes (in other words, a romanticizing of the Court).²¹

After the judiciary began deferring to broad claims of executive power, Fisher argues that both constitutional principles and national welfare suffered. When presidents are left to their own devices, they make mistakes, argues Fisher. His inventory of such mistakes on the first page of *Supreme Court Expansion of Presidential Power*—mistakes that he addresses in detail over the course of the book—is a compelling introduction to his argument, given that almost every president since Truman has been implicated in some sort of scandal relating to deception and the unilateral exercise of executive power.

Because of the cost to both the Constitution and national welfare when executives are allowed to operate unchecked, Fisher's book urges critical assessment of Supreme Court opinions, as well as the scholarship that can inform those opinions—the latter of which can either repeat or challenge judicial errors, thereby influencing public perceptions of the legitimate exercise of executive power. Fisher takes particular issue with what he sees as the romanticizing of presidents and presidential power by scholars such as Arthur M. Schlesinger, Jr. (who helped popularize the sole organ doctrine/mistake) and Richard Neustadt.²² He traces—I am not sure how convincingly—this romanticizing of presidents to the behavioral movement in political science that displaced public law scholars like Edward Corwin, who emphasized constraints on presidential power instead of, say, the personal skills or ambition of a president.²³ Fisher also cites an interesting study by David

16. *Id.* at 71.

17. STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013).

18. MARIAH ZEISBERG, *WAR POWERS* (2013).

19. *See* GRIFFIN, *supra* note 17, at 79; ZEISBERG, *supra* note 18, at 105.

20. FISHER, *supra* note 6, at 311.

21. *Id.* at 11–12.

22. *Id.* at 6.

23. *Id.*

Gray Adler, which finds that introductory American government textbooks reinforce the idea that presidents have plenary and exclusive powers in foreign affairs and give scant attention to presidential mistakes.²⁴

Fisher argues that innovations like the legislative veto exemplify a good approach to separation of powers: with the legislative veto, Congress and the executive branch come to a power sharing agreement that enables both to fulfill their respective responsibilities.²⁵ Thus, Fisher devotes an entire chapter to the subject of legislative vetoes and the Supreme Court's decision in *INS v. Chadha*,²⁶ which struck down legislative vetoes as unconstitutional. Fisher also interrupts his chronological organization to devote a chapter to state secrets privilege, where he chastises the Court for deferring to executive assertions of unilateral control over information.²⁷ It would be interesting to hear Fisher engage with the argument that institutional power sharing can increase executive power, as it arguably facilitates the delegation of powers to the executive branch. Consider, for example, detention and surveillance powers, both expansions of executive power which were arguably facilitated by institutional power sharing and the creation of the Foreign Intelligence Surveillance courts.

In *President Obama*, the book he published a year after *Supreme Court Expansion of Presidential Power*, Fisher states that his goal is to examine the Obama presidency within the context of presidents that have come after World War II.²⁸ Fisher is particularly interested in comparing the constitutional positions of the Obama administration with the Bush II administration, and comparing Obama's earlier criticisms of the unconstitutionality of actions of the Bush II administration with Obama's own actions as president.²⁹ The book is topically organized over nine chapters, beginning with chapter one's historical overview of presidential power ("Presidential Power that Obama Inherited"), and covers such topics as "Independent Executive Actions" (chapter three), "Immigration Policy" (chapter five), and "Executive Claims of Secrecy" (chapter seven). Most chapters start with a brief historical overview of the policy history of that chapter's topic, such as immigration, and then focus on the questions of continuity and change between, one, the policies and approaches of the Obama and Bush II administrations, and two, Obama's earlier statements and his actions as president.

Fisher's *President Obama* is thus wide-ranging, covering much ground in its 264 pages. Ultimately, Fisher concludes that Obama's willingness to turn to unilateral action when frustrated with the slow process of legislation continues the expansion of executive power under Bush II.³⁰ Fisher is particularly critical of Obama's efforts to close Guantanamo, noting that Obama turns to unilateral executive action first and, in doing so, alienates lawmakers and thus is unable to achieve his goal of closing the facility during

24. *Id.* at 8 (citing David Gray Adler, *Textbooks and the President's Constitutional Powers*, 35 *PRESIDENTIAL STUD. Q.* 376 (2005)).

25. FISHER, *supra* note 6, at 182–98.

26. 462 U.S. 919 (1983).

27. FISHER, *supra* note 6, at 125–139.

28. LOUIS FISHER, *PRESIDENT OBAMA: CONSTITUTIONAL ASPIRATIONS AND EXECUTIVE ACTIONS* xi (2018).

29. *Id.* at xii–xiii.

30. *Id.* at 259–64.

his administration.³¹ With Obama's efforts to close Guantanamo, as well as in other episodes, Fisher is eager to show that the unilateral exercise of executive power is not only constitutionally questionable but also frequently imprudent, resulting in policy that is neither good for the country nor good for the president who uses executive power so aggressively. In Obama's efforts to close Guantanamo, as well as his ending of extraordinary rendition and torture, Fisher sees a contraction of executive power from the Bush II administration, but in other areas—most areas—Fisher identifies expansion that continues the precedents set by the Bush II administration and thus also represents a departure from Obama's campaign promises. This pattern is most notable in the area of executive secrecy, which Fisher is not the first to point out.

Fisher parts ways with some critics of the Obama administration in arguing that Obama's embracement of unilateral executive action cannot be explained away as a reaction to heightened polarization and an obstructing Congress; Fisher argues that Obama contributed to partisan rancor both through his rhetoric and through his unilateral exercise of executive power.³² Fisher notes that Obama frequently emphasized the importance of coming together as a country and bipartisan cooperation, but he argues that Obama undermined his own calls for unity by deploying his own divisive partisan rhetoric.³³ Fisher also connects Obama's frequent unilateral actions with partisanship, and Fisher pushes back against the notion that Obama was forced to turn to unilateral executive action because of an uncooperative Congress. Fisher rightly emphasizes that "Obama was not forced to [act unilaterally]. It was a choice."³⁴

While Fisher identifies much continuity with the expansion of executive power under the Bush II administration, he also has a chapter on "Individual Rights" (chapter four), where he sees Obama departing from the path of Bush II in a constitutionally positive way. In the area of individual rights, Fisher argues, Obama acted consistently with his campaign promises and provided constitutional leadership.³⁵ Yet this chapter is not obviously consistent with the rest of Fisher's analysis. While Fisher criticizes Obama elsewhere for too quickly turning to unilateral executive action, Fisher does not note that, in his efforts to repeal Don't Ask, Don't Tell, Obama worked with Congress when there was pressure on the left for him to act unilaterally. Similarly, Fisher also does not address the constitutional conundrums of the Obama administration's refusal to defend the Defense of Marriage Act—which, while not unprecedented, is still a notable exercise of executive power—nor does Fisher engage the constitutional implications of Obama's many executive actions to protect LGBT rights.³⁶

The reader is left wondering what to make of Obama's unilateral actions on behalf of individual rights: constitutional leadership, or unconstitutional and counterproductive overreach? Fisher does not provide a way to reconcile these two opposing interpretations. With the benefit of hindsight, Fisher's warning that unilateral executive action is both

31. *Id.* at 58.

32. *Id.* at 261–62.

33. FISHER, *supra* note 28, at 28–29.

34. *Id.* at 34.

35. *Id.* at 88.

36. *Id.* at 112–16.

constitutionally problematic and a form of “lawless and chaotic policymaking . . . not in the national interest” appears prescient, as the Trump administration promptly reversed the executive actions Obama took to protect LGBT rights.³⁷ Yet that reversal does not mean that the administration did not exercise constitutional leadership in protecting LGBT rights. While Fisher privileges a substantive approach to separation of powers over a formalistic one, his seemingly contradictory interpretations of unilateral actions on behalf of individual rights suggests that perhaps more “substance” should be brought in—or is being brought in—to his analysis of executive actions. In other words, procedures such as unilateral actions also seem to be (and should be, I think) evaluated contextually, in light of the constitutional ends such procedures aim to achieve.

To be fair, though, in both his books, Fisher’s goal is neither the development of constitutional theory nor the development of doctrinal arguments for constrained executive power; his goal is to correct erroneous accounts of the expansion of executive power and to contextualize that expansion in terms of US history, longstanding constitutional principles, interbranch politics, and political and policy consequences. Kitrosser’s book, *Reclaiming Accountability*, complements Fisher’s, as she appears to share many of Fisher’s views but her approach is quite different; rather than focus on the particulars of judicial and executive actions in historical context, she is interested in deconstructing theories of presidential supremacy and constructing a theory of accountability grounded in constitutional principles and doctrine.

Kitrosser’s explicit aim for the first half of her book is to describe theories of executive supremacy and unitary executive theory, explain how these theories are linked to “arguments for a broad presidential power to control information,” and then show that these theories are incorrect interpretations of the Constitution.³⁸ Kitrosser hopes that this first part of the book will be useful to a broad audience, and experts will likely find the second half of her book the most interesting. It is in the second half that she presents her own argument: that the Constitution positions presidents within what she calls a “substantive accountability framework.”³⁹ She contrasts this substantive accountability with “formal accountability,” the latter of which focuses on whether means exist for other actors to respond to the potential abuse of executive power, but not whether the information exists to make such responses “effective.”⁴⁰ Substantive accountability focuses on both information and meaningful responses.⁴¹ Kitrosser also argues that the principle of substantive accountability is a constitutional principle, grounded in the First Amendment, Congress’s Article I legislative powers, and principles of separation of powers.⁴²

Kitrosser’s focus on substantive accountability draws attention to institutional features of the contemporary executive that make it difficult for the other branches, and the public, to know what is going on inside the executive branch and thereby respond to

37. *Id.* at 263.

38. HEIDI KITROSSER, *RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION* 10 (2015).

39. *Id.* at 15.

40. *Id.* at 16.

41. *Id.*

42. *Id.* at 16–17.

potential abuses of power or misdeeds. For example, she notes that over one million people have the authority to classify documents; top-level leaks, combined with systematic overclassification, allows presidents to control the flow of information.⁴³ Kitrosser persuasively argues that this unilateral classification of information abridges the First Amendment and that Congress has the power to organize the executive branch to create external checks.⁴⁴ As with many of her examples (and in Fisher's accounts as well), the reality of an enormous and complex bureaucracy, made up of competing interests, cuts against formulations of the executive branch as unitary. Kitrosser highlights a number of potential institutional reforms that Congress could, through its legislative powers, undertake. Some examples of her suggestions include a law requiring the Attorney General to disclose to Congress interpretations by the Department of Justice that find a law unconstitutional on Article II grounds⁴⁵; statutory constraints on the state secrets privilege⁴⁶; and statutes that ensure certain positions in the executive branch can be dismissed for cause only (something also discussed by Fisher).⁴⁷ Like Fisher, she also argues that courts have abdicated their responsibility in a number of cases when they simply accept executive assertions of state secrets privilege and do not conduct in camera review.⁴⁸

Kitrosser's analysis stands out in her attention to the ways in which changing views on the legitimate exercise of executive power circulate between elected officials, courts, the public, and the academic community. In her concern with public acceptance of claims of judicial supremacy, and how academic and legal discourse contribute to that acceptance, Kitrosser's book overlaps with Fisher's. She takes this point further than Fisher, though, in linking the legitimation of expansive executive power to the presidential power to alter the policy status quo. Kitrosser explains, for example, how presidents have legitimated presidential secrecy by asserting broad claims to executive privilege and then keeping information secret.⁴⁹ If Congress or the courts do not immediately challenge this assertion and practice of executive privilege, then the contours of what is viewed as the legitimate exercise of executive privilege expands. In other words, the status quo—that is, executive secrecy—is legitimated as the public witness the executive make broad claims of executive privilege and have those claims succeed.⁵⁰

Both Kitrosser and Fisher overlook an additional dimension in this unvirtuous circle of expanding executive power: the president's informal powers to set the agenda and frame public debates over the legitimate exercise of power. In other words, presidents have an advantage in constitutional debates over the legitimate exercise of power not only by their ability to quickly alter the policy status quo, but also by their power to shape the discursive status quo. This power, long recognized in the political science literature on the presidency, was on clear display with public reception of Special Counsel Robert Mueller's

43. KITROSSER, *supra* note 38, at 16, 62.

44. *Id.* at 16–17.

45. *Id.* at 104.

46. *Id.* at 123.

47. *Id.* at 164–65.

48. KITROSSER, *supra* note 38, at 113–42.

49. *Id.* at 57.

50. *Id.*

investigation of the Trump administration. As Katy Harriger has argued, legal officials will always be at a disadvantage with confronting executive abuse of power in public arenas, as their authority depends upon their neutrality, their window of opportunity to persuade the public is limited, and that opportunity only comes after presidents have had weeks, if not months or years, to defend their actions to the public.⁵¹

Fisher dedicated his *Supreme Court Expansion of Presidential Power* to Justice Jackson, who wrote in *Youngstown*: “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.”⁵² Both Fisher and Kitrosser appear to strongly agree with Jackson’s opinion. And like Jackson in *Youngstown*, Fisher and Kitrosser practice what they preach. These three books are written not only for legal experts, but for a broad public: for the executive to be under the law, the public has to view presidential supremacy as the constitutional violation and threat to public welfare that it indeed is.

51. See Katy J. Harriger, *The Law: The President and the Independent Counsel: Reflections on Prosecutors, Presidential Prerogatives, and Political Power*, 31 PRESIDENTIAL STUD. Q. 338 (2001).

52. FISHER, *supra* note 6, at 123 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952)).